Justrite Sdn Bhd v Shapadu Energy and Engineering Sdn Bhd & Ors

HIGH COURT (MIRI) — CIVIL SUIT NO 22–13 OF 1997 (MR)
SULAIMAN DAUD JC
5 JUNE 2002

Contract *— Oral agreement — Admissibilty of evidence — Oral and documentary evidence — First defendant secured a contract and invited three companies to submit their tender — Oral representation that plaintiff was awarded a contract by the third defendant — The Management and Tender Committee later issued the letter of intent to another company which was accepted — Whether there was a contract formed between the plaintiff and the first defendant in respect of the oral representation*

The first defendant had secured a contract for certain mechanical construction. The first defendant invited three companies, one of them being the plaintiff, to submit a competitive quotation to provide the insulation service for the said construction ('the ABF work'). Only two of them, the plaintiff and Jemerah Sdn Bhd ('Jemerah'), submitted their proposals. The ABF work was given to Jemerah. The plaintiff brought this action against all the defendants for loss and damages arising from an alleged breach of an oral contract by the first defendant to award the ABF work to the plaintiff. The second to the fifth defendants were sued for the alleged misrepresentation made by them to the plaintiff in respect of the award of such a contract. In addition, the second and fifth defendants were also sued for the tort of conspiracy with a view to injure the plaintiff. The defendants denied the plaintiff's claim and instead counterclaimed against the plaintiff for the lifting of the Anton Piller order and for exemplary damages in respect of loss and damages occasioned thereby. The issues that arose for determination were, inter alia, (i) whether there was a contract formed between the plaintiff and the first defendat in respect of the ABF work; (ii) whether the second to the fifth defendants had collectively misrepresented to the plaintiff that it had been awarded the ABF work; and (iii) whether there was any conspiracy between the second and fifth defendants to injure the plaintiff.

Held, dismissing the plaintiff's claim and allowing the defendants' counterclaim:

(1) With regard to exh P20, from its nature and content, the same does not constitute the Management and Tender Committee ('MTC') decision to award the ABF work to the plaintiff. The said document was just another internal paper of the committee for circulation to all its members for their decision on the recommendation to award the ABF work to the plaintiff. Such circular will only have effect and be operative as the decision of the committee after all the members entitled to receive the same have endorsed their signatures thereon signifying either their agreement or rejection to the recommendation so made. In the

present case, the fifth defendant had not signed the said paper for it to have any effect (see p 510B–D).

(2) Having regard to the facts and circumstances of the case as a whole, including the subject matter of the said representation, the stage of the negotiation of the ABF work, the position held by the third defendant in the first defendant's company and the act of the plaintiff in further submitting the revised rate for the valve after the alleged oral contract, the court finds on the balance of probabilities that the third defendant did not make the alleged representation. It is not probable that the staff of the first defendant also has knowledge of the decision of the MTC on the award of the ABF work when the MTC Paper was yet to be signed by one of its members (see pp 510H–511A).

(3) All the evidence is not enough to show that each of said defendants individually had held themselves out as having the actual authority to enter into a contract for and on behalf of the first defendant. To succeed in such claim, the plaintiff must show that the first defendant company had, or the other defendants themselves had, made the representation, by documentary evidence or otherwise, that such defendants or they, as the case may be, had such authority. In the present case, no such evidence was presented by the plaintiff (see p 511E–F).

(4) There is no basis in the assertion that the second and the fifth defendants had come to an agreement to overturn the first defendant's earlier decision to injure the plaintiff (see 513C–D).

(5) Upon evaluation of the evidence adduced at the trial as a whole, the court is satisfied that the plaintiff in the affidavit in support of the Anton Piller order failed not only to make a full and frank disclosure of all material facts known to them, but also to make proper inquiries of any relevant facts related thereto. Such non-disclosure includes the date of the alleged acceptance of the plaintiff's bid, how and by whom the acceptance was made, the subsequent submissions of further revised rates on the valve and the reduction of the plaintiff's lump sum price after the alleged oral contract. All such particulars were material facts which needed to be disclosed and which would undoubtedly have effect on the decision of the court whether to grant the order or otherwise. The court allowed the counterclaim (see pp 514H–515A).

[Bahasa Malaysia summary

Defendan pertama telah mendapat satu kontrak untuk pembinaan mekanikal tertentu. Defendan pertama mempelawa tiga buah syarikat, salah satu daripanya adalah plaintif, untuk mengemukakan satu sebutharga yang bersaingan untuk memberikan perkhidmatan penebatan untuk pembinaan tersebut ('kerja ABF'). Hanya dua daripada mereka, plaintif dan Jemerah Sdn Bhd ('Jemerah'),

mengemukakan cadangan mereka. Kerja ABF tersebut telah diberikan kepada Jemerah. Plaintif telah memulakan tindakan ini terhadap kesemua defendan-defendan untuk kerugian dan ganti rugi yang berbangkit daripada dakwaan kemungkiran kontrak lisan oleh defendan pertama untuk mengawardkan kerja ABF kepada plaintif. Defendan kedua hingga kelima telah didakwa kerana salah representasi yang telah dibuat oleh mereka kepada plaintif berhubung dengan award kontrak yang sedemikian. Tambahan pula, defendan-defendan kedua dan kelima telah juga didakwa untuk tort konspirasi untuk menjejaskan plaintif. Defendan-defendan menafikan tuntutan plaintif dan sebaliknya telah menuntut balas terhadap plaintif untuk menyingkap perintah Anton Piller dan untuk ganti rugi teladan berhubung kerugian dan ganti rugi yang disebabkan olehnya. Isu-isu yang berbangkit untuk penentuan adalah, antara lainnya: (i) sama ada terdapatnya kontrak yang dibentuk antara plaintif dan defendan pertama berhubung dengan kerja ABF; (ii) sama ada defendan-defendan kedua hingga kelima telah secara kolektifnya tersalah-nyata kepada plaintif bahawa ianya telah diberikan kerja-kerja ABF tersebut; dan (iii) sama ada terdapatnya sebarang konspirasi antara defendan-defendan kedua hingga kelima untuk memudaratkan plaintif.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan-defendan:

(1) Berhubung eksh P20, daripada sifat dan kandungannya, ianya tidak membentuk keputusan Jawatankuasa Pengurusan dan Tender ('MTC') untuk mengawardkan kerja ABF tersebut kepada plaintif. Dokumen tersebut adalah hanya satu kertas dalaman jawatankuasa tersebut untuk pengedaran kepada semua ahli-ahlinya untuk keputusan mereka mengenai syor untuk mengawardkan kerja ABF tersebut kepada plaintif. Pekeliling yang sedemikian akan hanya mempunyai kesan dan beroperasi sebagai keputusan jawatankuasa selepas kesemua ahli-ahli yang berhak untuk menerimanya telah menurunkan tandatangan mereka ke atasnya yang menandakan sama ada persetujuan atau penolakan mereka kepada syor yang dibuat sedemikian. Dalam kes semasa, defendan kelima telah tidak menandatangani kertas tersebut untuk ianya mempunyai sebarang kesan (lihat ms 510B–D).

(2) Memandangkan fakta dan keadaan-keadaan kes tersebut secara keseluruhannya, termasuk hal perkara representasi tersebut, peringkat perundingan kerja ABF, kedudukan yang dipegang oleh defendan ketiga di dalam syarikat defendan pertama dan perbuatan plaintif dalam mengemukakan seterusnya kadar yang disemak untuk injap tersebut selepas kontrak lisan yang didakwa, mahkamah memutuskan atas imbangan kebarangkalian bahawa defendan ketiga tidak membuat representasi yang didakwa. Ianya adalah tidak berkemungkinan bahawa kakitangan defendan pertama juga mempunyai pengetahuan mengenai keputusan

MTC atas award kerja ABF tersebut sedangkan Kertas MTC masih belum ditandatangani oleh salah satu daripada ahli-ahlinya (lihat ms 510H–511A). A

(3) Kesemua keterangan tidak mencukupi untuk menunjukkan bahawa setiap satu daripada defendan-defendan tersebut telah secara individunya mengemukakan diri mereka sebagai mempunyai kuasa sebenar untuk memasuki sesuatu kontrak untuk dan bagi pihak defendan pertama. Untuk berjaya di dalam tuntutan sedemikian, plaintif mesti menunjukkan bahawa syarikat defendan pertama telah, atau defendan-defendan lain sendiri telah, membuat representasi tersebut, melalui keterangan dokumentar. Atau sebaliknya, bahawa defendan-defendan sedemikian atau mereka, sepertimana keadaannya, mempunyai kuasa yang sedemikian. Dalam kes semasa, tiada keterangan sedemikian telah dikemukakan oleh plaintif (lihat ms 511E–F). B C

(4) Tidak terdapat sebarang dasar dalam penegasan bahawa defendan-defendan kedua dan kelima telah mencapai persetujuan untuk menterbalikkan keputusan defendan yang lebih awal bagi memudaratkan plaintif (ms 513C–D). D

(5) Setelah penilaian akan keterangan yang dikemukakan di perbicaraan secara keseluruhannya, mahkamah berpuashati bahawa plaintiff dalam afidavit yang menyokong perintah Anton Piller telah gagal bukan sahaja untuk membuat satu pendedahan sepenuhnya dan yang sebenarnya akan kesemua fakta-fakta penting yang diketahui mereka, tetapi juga membuta penyiasatan yang sempurna mengenai sebarang fakta-fakta relevan yang berkaitan dengannnya. Ketidakdedahan yang sedemikian termasuk tarikh penerimaan didakwa akan tawaran plaintif, bagaimana dan oleh siapa telah penerimaan itu dibuat, hujah-hujah kemudiannya mengenai kadar-kadar selanjutnya atas injpa tersebut dan pemotongan jumlah pukal plaintif selepas kontrak lisan didakwa. Kesemua butir-butir yang sedemikian merupakan fakta-fakta penting yang perlu didedahkan dan yang mana akan tanpa diragui mempunyai kesan kepada keputusan mahkamah sama ada untuk memberikan perintah itu atau sebaliknya. Mahkamah telah membenarkan tuntutan balas tersebut (lihat ms 514H–515A).] E F G

Notes H

For cases on oral agreement generally, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3398–3406.

Cases referred to

Dormeuil Freres and Anor v Nicolian International (Textiles) Ltd [1988] 3 All ER 197 (refd) I

Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd

A *& Anor* [1964] 2 QB 480 (refd)
MMC Power Sdn Bhd v Abdul Fattah Mogawan & Anor Sdn Bhd [2001] 1 CLJ 207 (refd)
Royal British Bank Ltd v Turquand [1843–60] All ER 435 (refd)
Yap JH v Tan Sri Loh Boon Siew & Ors [1991] 4 CLJ 243 (refd)
B *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors (No 4)* [1998] 7 MLJ 551 (refd)

Legislation referred to

Companies Act 1965 s 25(4)

C

Voon Chen Thong (*Voon & Co*) for the plaintiff.
KY Lin (*Antonio Sim* with him) (*Kadir, Wong, Lin & Co*) for the defendants.

D **Sulaiman Daud JC**: By a writ of summons issued on 28 April 1997, the plaintiff brought this action against all the defendants for loss and damages arising from an alleged breach of an oral contract by the first defendant to award certain work to the plaintiff. The second to the fifth defendants were sued for the alleged misrepresentation made by them to the plaintiff in respect of the award of such a contract. In addition, the second and fifth defendants were also sued for the tort of conspiracy with a view to injure the E plaintiff. By the amended defence dated 24 May 2000, all the defendants denied the plaintiff's claim and instead counterclaimed against the plaintiff for the lifting of the Anton Piller order dated 6 May 1997 and for exemplary damages in respect of loss and damages occasioned thereby.

The factual background as established by the evidence, oral and F documentary, can be summarized as follows. The first defendant secured a contract with Asean Bintulu Fertilizer for a certain mechanical construction. In connection therewith, the first defendant invited three companies, including the plaintiff, to submit a competitive quotation to provide the insulation services for the said construction ('the ABF work'). It was also a term of the invitation (exh P1) that the successful bidder enter G into a subcontract with the first defendant based on certain documents set out therein.

At the close of the tender on 13 February 1997, only the plaintiff and another company, Jemerah Sdn Bhd ('Jemerah'), submitted their proposal. The plaintiff quoted a lump sum price of RM1,650,000 for the ABF work H while Jemerah quoted the sum of RM2,053,000. The first defendant held a separate clarification meeting with the plaintiff and Jemerah on 19 February 1997 and 20 February 1997 respectively. At the clarification meeting, the plaintiff was asked to submit further documents, including the company's audited accounts and its profile, a performance bond and bank guarantee. It was also asked to revise the unit rate for the valves works. The plaintiff I responded to all such requests by way of letter dated 24 February 1997 (exh P3).

On 25 February 1997, the plaintiff alleged that the third defendant

represented orally to its managing director that it had been awarded the contract. On 28 February 1997, the plaintiff was again asked by the first defendant to adjust its unit rates for valves to which the plaintiff responded by a letter of the same date. In the case of Jemerah, it first revised its lump sum price to RM1,900,000 on 24 February 1997 at the request of the first defendant. It further reduced the said sum on 28 February to RM1,600,000. A B

The Management and Tender Committee ('the MTC') of the first defendant which met on 4 March 1997, upon evaluation, among others, of the two companies' profiles, experiences, financial statements and their respective revised contract prices, decided to issue the letter of intent for the ABF work to Jemerah. The letter of intent which was subsequently issued on 5 March 1997 was duly accepted by Jemerah on 6 March 1997. C

It is also pertinent to note that the plaintiff had obtained an ex parte Anton Piller order to enter the first defendant's premises on 6 May 1997. The order was duly executed where certain documents, including the first defendant's Management and Tender Committee Paper ('MTC Paper') dated 24 May 1997 (exh P20), were seized from the first defendant's premises. D

From the pleadings and facts of the case, the issues that arose for determination are essentially as follows:

(a) whether there was a contract formed between the plaintiff and the first defendant in respect of the ABF work on 25 February 1997 or earlier; E

(b) whether the second to the fifth defendants have collectively misrepresented to the plaintiff that they have been awarded the ABF work;

(c) whether there was any conspiracy between the second and the fifth defendants to injure the plaintiff; F

(d) whether there was a contract formed.

The case for the plaintiff as pleaded and presented during submissions was that it had been successfully awarded the ABF work by the first defendant and that the fact had been communicated orally to the plaintiff by its project manager, the third defendant. The oral evidence adduced in support of the plaintiff's claim came from the testimony of James Yusop (PW2), the managing director of the plaintiff. On the alleged communication of the award, PW2 in his testimony, stated as follows: G H

> After 24 February 1997, I followed up with Shapadu on the progress of the tender. On 25 February 1997, I went to Shapadu's office in Krokop, Miri and I was informed by other staff that we were awarded the contract. After that, I went to see Mr Ray Fung (the fourth defendant), then I was told to check with Mr Sim Kien Beng (the third defendant). It was about 10am. I was told verbally by Mr Sim Kien Beng that I was awarded the contract. Mr Sim said 'the contract is yours and everything was OK'. I was told to check with Mr Ray Fung on the scheduling of the material. I had known Mr Sim Kien Beng personally when he first joined Shapadu. I

On the authority of the said Sim Kien Beng to award the contract, PW2 testified that on 25 February 1997 he did not know who had the authority to award the contract. All he knew was that he was informed by the project manager that he was awarded the ABF work and that he believed what Mr Sim told him.

The documentary evidence adduced in support of the plaintiff's claim on the award of the ABF work includes the MTC Paper (exh P20) on the evaluation of the subcontractor for the ABF work. The MTC Paper was circulated to all members of the committee with the recommendation that the ABF work be awarded to the plaintiff. The second, third and fourth defendants signified their agreement to the recommendation made thereon while the fifth defendant, Peter Jilan, did not sign the said paper.

The learned counsel for the plaintiff contended that based on the oral representation made by the third defendant to PW2 as aforesaid, together with the documentary evidence on the recommendation as disclosed by the MTC Paper, there was an oral contract between the plaintiff and the first defendant on the terms of the original bid proposal submitted on 13 February 1997 by the plaintiff to the first defendant.

The learned counsel then referred to s 25(4) of the Companies Act 1965 which provides that a contract may be made by parol on behalf of the company by any person acting under its authority, expressed or implied, and the contract so made shall be effectual in law. He also cited the Federal case of *MMC Power Sdn Bhd v Abdul Fattah Mogawan & Anor Sdn Bhd* [2001] 1 CLJ 207 which adopted with approval the doctrine of apparent and ostensible authority expressed by Lord Diplock in *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480.

With regard to the authority of the third defendant to enter into such a contract for and on behalf of the first defendant, the learned counsel argued that the representation made by the third defendant to the plaintiff was related to a business transaction, namely the ABF work, of which he was the overall project manager. As a project manager, he was entrusted by the first defendant to give the information based on the recommendation of the MTC as contained in exh P20. The learned counsel further submitted that based on the rule in *Turquand* (*Royal British Bank Ltd v Turquand* [1843–60] All ER 435), there is no duty upon the plaintiff to conduct an investigation as to the capacity or power of the third defendant to make such representations. Further, he added that the first defendant could not use as a defence, any irregularity in the decision of the MTC in awarding the contract to the plaintiff as disclosed by exh P20.

On the other hand, the learned counsel for the defendants contended that there was no oral contract formed between the plaintiff and the first defendant on 25 February 1997 or earlier. The learned counsel referred to the testimony of the third defendant himself who denied making the representation to James Yusop on the award of the contract as alleged. He further submitted that even if such a representation was so made, the plaintiff failed to adduce any evidence or to prove that the third defendant was authorized to make the acceptance of the tender bid to any third party.

Alternatively, it is submitted that the statement made by the third defendant that 'the contract is yours and everything is OK' does not amount to an acceptance giving rise to a binding contract.

Whether or not there was a binding contract as alleged is a question of fact and law. On this issue, in my opinion, the issues for determination are firstly whether exh P20 constitutes the decision of the MTC on the award of the contract to the plaintiff, secondly, whether the third defendant made the alleged representation on the award of the contract and thirdly whether the second, third, fourth and fifth defendants have or hold themselves out as having actual authority in respect of the ABF work.

To better understand the true purpose and intent of exh P20, I find it expedient to reproduce the same, which is in the following form:

SHAPADU ENERGY AND ENGINEERING SDN BHD MTC PAPER

Paper No	:	SSO/MTC/97/...
Business Sector	:	Sarawak Sabah Operation
Date	:	24.02.97
Title	:	ABF Second Ammonia Revamp
Subject	:	Evaluation Foe Sub Contractors For Insulation Material Works
Main Con	:	Seen
SCOPE OF WORK	1	Supply insulation materials and consumable installation works
DURATION OF CONTRACT		February 1997 To July 1997
START OF CONTRACT		1 March 1997
ENQUIRY SENT TO:	1	Syarikat Kejuruteraan Pertama
	2	Kumus
	3	Jemerah
	4	Justrite
RESPONSE	1	Quotes from Jemerah and Justrite were received by 13 December 1997, the closing date.

2 Closing Date was extended to 15 February 1997 for Sykt Kejuruteraan Pertama and Kumus. However, there was no response from both parties.

EVALUATION

PRICE

1 See Attached Evaluation Sheet	Jemerah	Justrite	Seen
Material	1203000	11000000	1481447
Service	850000	550000	983158
Total	2053000	1650000	2464803

2 However, the unit rate for pipe component — valve is too high and needs to be renegotiated to a lower price

CLARIFICATION MEETING

1	Refer to attached MOM for Justrite	Held On 19 February 1997
2	Refer to attached MOM for Jemerah	Held on 20 February 1997

RECOMMENDATION

Award to Justrite

THIS IS MTC PAPER WAS REVIEWED ON 19/2 AND 25/2 AND SIGNED BY

Ray Fung	*(Signed)*	Remarks	*Agreed*
Sim Kien Beng	*(Signed)*	Remarks	*As per recommendations 25/4/97*
Mohd Mahidin	*(Signed)*	Remarks	*agreed*
Sabri Lampan	*(Signed)*	Remarks	....
Peter Jilan	*(Signed)*	Remarks	....

Touching on the status of the MTC Paper (exh P20) DW4, the third defendant who was one of the MTC members, testified that he prepared the said document on 24 February 1997 pursuant to the clarification meeting with the plaintiff and Jemerah, together with his recommendation to the members on the award of the ABF work. DW5 who was the chairman of the MTC testified that if one member did not sign the MTC Paper, a meeting would be convened for the member to give his explanation. DW6 in his evidence stated that he did not sign the MTC Paper as he did not agree with the recommendation. He also testified that if one of the MTC members did not sign the same, then a MTC meeting has to be convened.

With regard to the MTC Paper (exh P20), I am in agreement with the learned defendants' counsel that from its nature and content, the same does not constitute the MTC decision to award the ABF work to the plaintiff. It appears to me that the said document is just another internal paper of the committee for circulation to all its members for their decision on the recommendation to award the ABF work to the plaintiff. In my view, such a circular will only have effect and be operative as the decision of the committee, after all the members entitled to receive the same have endorsed their signatures thereon signifying either their agreement or rejection to the recommendation so made. In the present case, it is not disputed that the fifth defendant had not signed the said paper on 25 February 1997 or at any time thereafter for it to have any effect. It is elementary that the first requisite of a contract is that the parties should, inter alia, have reached an agreement that would involve an offer and acceptance of the offer. It is also to be observed in exh P20 under the heading 'Price' is endorsed the statement that '... the unit rate for the pipe component valve is too high and needs to be renegotiated to a lower price'. This shows that there are some material terms which require further negotiation between the parties, thus further negating the plaintiff's assertion that the MTC has reached a decision to award the contract based on exh P20. In fact, as can be seen, the negotiation between the plaintiff and the first defendant continued well after 25 February 1997 where the plaintiff subsequently submitted the second revised unit rate and reduced the lump sum price by RM50,000 on 3 March 1997.

Having decided on the nature and effect of exh P20, I will next turn to the question as to whether the third defendant made the alleged representation. I did not have the opportunity to observe PW2's demeanour to ascertain his credibility since his testimony was recorded by the previous trial judge. At the same time, I find that the denial made by DW4 on the alleged representation is a mere bare denial and was not supported by any other material particulars. However, having regard to the facts and circumstances of the case as a whole, including the subject matter of the said representation, the stage of the negotiation of the ABF work, the position held by the third defendant in the first defendant's company and the act of the plaintiff in further submitting the revised rate for the valve and in reducing the lump sum contract by RM50,000 after the alleged oral contract, it is my finding, on the balance of probabilities, that the third defendant did not make the alleged representation. PW2's testimony that he

was also informed by the other staff that he was awarded the contract raised further doubt on the truth of his statement. In my opinion it is not probable that the staff of the first defendant also had knowledge of the decision of the MTC on the award of the ABF work when the MTC Paper was yet to be signed by one of its members. In the event that my finding is wrong, I will proceed to determine the other related issues on the assumption that the representation was so made.

Next, I turn to consider whether the second, third, fourth and fifth defendants have or held themselves out to the plaintiff as having actual authority in respect of the ABF work as pleaded. From the submission of the learned counsel for the plaintiff, it appears to me that the contention relating the actual authority of the said defendants was substantially based on the respective positions held by each of them in the first defendant's company. In the case of the second defendant, it is admitted that he had the actual authority to award a contract for and on behalf of the MTC based on its decision. It is also not disputed that the third defendant is the project manager of the first defendant and is a member of the MTC. PW5, the plaintiff's technical adviser to the ABF work, testified that the third defendant, in his capacity as a project manager had full authority to award the ABF work to the plaintiff. The learned counsel also relied on exh P35 (at p 14 of Bundle G) as proof of the third defendant's authority in respect of the same. The other documentary evidence relied on by the plaintiff on the alleged authority of the said defendants is exh P36, the internal memorandum of the first defendant on the constitution and membership of the MTC, of which all the said defendants are members.

In my view, all such evidence as aforesaid is not enough to show that each of said defendants individually had held himself out as having the actual authority to enter into a contract for and on behalf of the first defendant. To succeed in such a claim, the plaintiff must show that the first defendant company had, or the other defendants themselves had, made the representation, by documentary evidence or otherwise, that such defendants or they, as the case may be, had such authority. In the present case, no such evidence was presented by the plaintiff. However, it is obvious from exh P36 that the authority to make an award for subcontracting services for the first defendant was not vested with the second to the fifth defendant individually but with the MTC whose membership comprised all such defendants.

On the submission of the 'apparent' or 'ostensible' authority, the learned counsel for the defendants have rightly pointed out that the same was not pleaded and should not be given due consideration. On the doctrine of apparent or ostensible authority, I revert to *Freeman & Lockyer* (as adopted in *MMC Power Sdn Bhd*) aforesaid where Lord Diplock, in relation to its application to corporation, made the following observation (at p 505):

> ... that unlike a natural person, it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation.

His Lordship further added at p 505 as follows: A

> The most common form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely by permitting the agent to act in the management or conduct of the principal's business.

In the present case, even if 'apparent' or 'ostensible' authority is pleaded, it is my finding that the plaintiff has failed to adduce any evidence to show that B the first defendant or its board of directors or even the MTC has made the representation that the second to the fifth defendants have authority to act individually in the conduct of the principal's business relating to the award of tender. Nor has any evidence been adduced to show that the first defendant has permitted the second to the fifth defendants to act in the C conduct of such business. It is therefore my finding that the said defendants have no such 'apparent' or 'ostensible' authority to do all such acts as contended by the plaintiff.

Misrepresentation

D

It was expressly pleaded in para 9 of the reamended statement of claim that the second, third, fourth and fifth defendants had collectively misrepresented to the plaintiff that the plaintiff had been awarded the ABF work by reason of which it suffered loss and damages. In consequence thereof, the plaintiff claimed against them jointly for special and general damages. The question is whether there was any such misrepresentation E made by the said defendants collectively. It is obvious to me that the answer is in the negative. The nearest that can be said to be a collective decision of the said defendants on or before 25 February 1997 is contained in exh P20 which I have earlier held to be of no effect since the same had not been signed by all the MTC members. Moreover, exh P20 was never disclosed to the plaintiff and was only seized pursuant to the Anton Piller order. The F only evidence adduced by the plaintiff is the representation made by the third defendant to James Yusop. In view of my earlier finding that the third defendant neither had the actual or ostensible authority to conduct the first defendant's business relating to the award of the ABF work, the latter cannot be held to be vicariously liable for any misrepresentation made by G the third defendant. Similarly, the other defendants cannot be held to be jointly liable for the act and conduct of the third defendant that was not related to them or done outside the scope of his authority.

From its subsequent act after the alleged oral contract, it appears to me that the plaintiff did not reasonably believe that there was a binding contract concluded between the plaintiff and the first defendant. The fact that the H plaintiff continued to negotiate with the first defendant on the ABF work even after the formation of the alleged oral contract on 25 February 1997 further fortified my belief.

Conspiracy

I

The law on conspiracy is well settled. In order to make out a case of conspiracy, the plaintiff must establish: (i) an agreement between two or

more persons; (ii) an agreement for the purpose of injuring the plaintiff; and (iii) that acts done in execution of the agreement resulted in damage to the plaintiff (see *Halsbury's Laws of England*, (4th Ed) Vol 45, para 1527, followed in *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ 243).

In the present case, the allegation of conspiracy can be found in para 9A of the reamended statement of claim. The gist of the allegations of conspiracy were that the MTC had earlier awarded the ABF work to the plaintiff on 25 February 1997 to be followed by a letter of intent. However, the second and the fifth defendants had conspired to delay the issuance of the letter of intent to the plaintiff with the intention to overturn the earlier decision of the committee to award the ABF work to the plaintiff, and instead awarded the same to Jemerah. As part of the conspiracy, it is also alleged that the second and the fifth defendants must have communicated the plaintiff's lower original bid to Jemerah.

Again, in the light of my findings that there was no contract formed between the plaintiff and the first defendant on 25 February 1997, I find that there is no basis in the assertion that the second and the fifth defendants had come to an agreement to overturn the MTC's earlier decision to injure the plaintiff. It is to be recalled that the fifth defendant himself had never signified his agreement on exh P20 to award the ABF work to the plaintiff. It is obvious to me that the MTC continued to negotiate with the two bidders after 25 February 1997, not for the purpose of injuring the plaintiff, but to ensure that the first defendant would get the best price for the ABF work from a capable and financially stable subcontractor to protect the first defendants interest. It is also my finding that the plaintiff's allegation that the second defendant had communicated the plaintiff's lower original bid to Jemerah is mere suspicion and not supported by any evidence.

For all the reasons stated above, I dismiss the plaintiff's action against all the defendants with costs to be taxed, unless otherwise agreed.

Counterclaim

Next, I turn to consider the first defendant's counterclaim wherein it prays, inter alia, for the lifting of the Anton Piller order dated 6 May 1997 and exemplary damages. The ground for lifting the Anton Piller order are pleaded in para 13 of the amended defence and counterclaim which read as follows:

> The plaintiff had wrongfully and/or negligently obtained an Anton Piller order against the defendants on the following grounds:
>
> (a) failing to make frank disclosure of material facts while making the application for the Anton Piller order against the defendants;
>
> (b) falsely and deliberately making allegations that the second, third, fourth, and fifth defendants are agents of the first defendant;
>
> (c) the documents requested under the Anton Piller order are the internal documents belonging to the first defendant;
>
> (d) the plaintiff failed to establish a prima facie case against the defendants before it applied for the Anton Piller order; and

(e) the whole purpose of the Anton Piller application on the part of the plaintiff was to fish documents from the defendants to support the plaintiff's case.

The learned counsel for the plaintiff contended that it was not appropriate for the first defendant to make such an application at the trial stage. According to the learned counsel, the correct procedure is for the first defendant to apply to set aside the order after it was made. With respect, I do not agree with such a contention. From the pleading, it was obvious that the first defendant's application was made on the ground of material non-disclosure by the plaintiff in obtaining the order. It is clear from authorities that the appropriate time for the court to hear and determine an application to discharge an Anton Piller order on the ground that it was obtained as a result of material non-disclosure by the plaintiff is at the trial rather than during the interlocutory stage of the proceedings because the order usually having been executed, the only effect of the non-disclosure would be to affect the plaintiff's liability under his cross undertaking in damages (see *Dormeuil Freres and Anor v Nicolian International (Textiles) Ltd* [1988] 3 All ER 197, *Yukilon Manufacturing Sdn Bhd & Anor v Dato' Wong Gek Meng & Ors* (No 4) [1998] 7 MLJ 551.)

With regard to the allegation on the non disclosure of material facts, the learned counsel for the defendant referred to the summons in chambers related to the application (exh P47 at pp 1–49 of Bundle E), particularly to the affidavit affirmed by James Yusop (PW2 herein) in support of the application. It was pointed out by the learned counsel that in asserting, in para 4 of the affidavit, that the first defendant had accepted the plaintiff's offer of invitation to bid, the plaintiff had failed to disclose the date of the alleged acceptance and that such acceptance was communicated by the third defendant who was only the project manager of the plaintiff. The plaintiff also did not disclose the fact that there were further negotiations after the date of the alleged representation where the plaintiff ultimately submitted the second revised rate on the valve on 3 March 1997 and reduced the lump sum contract to RM50,000. The learned counsel further argued that the deponent in asserting that the second to the fifth defendants had the authority to deal with the plaintiff, failed to disclose the fact that the plaintiff was only relying on the oral representation made by the third defendant to James Yusop that 'everything is OK and the contract is yours'. It is also submitted that the assertion made in para 5 of the affidavit that the second to the fifth defendants had collectively represented to the plaintiff that they were awarded the contract was also not a frank disclosure of the material facts.

Upon evaluation of the evidence adduced at the trial as a whole, I am satisfied that the plaintiff in the affidavit in support of the Anton Piller order failed not only to make a full and frank disclosure of all material facts known to them, but also to make proper inquiries of any relevant facts related thereto. Such non-disclosure includes the date of the alleged acceptance of the plaintiff's bid, how and by whom the acceptance was made, the subsequent submissions of further revised rates on the valve and the reduction of the plaintiff's lump sum price after the alleged oral contract. In

my view, all such particulars were material facts which needed to be disclosed and which would undoubtedly have effect on the decision of the court whether to grant the order or otherwise.

On this ground alone, I allowed the counterclaim in terms of prayer (a), (b) and (c) in favour of the first defendant. Damages shall be assessed by the learned deputy registrar.

Plaintiff's claim dismissed and defendant's counterclaim allowed.

Reported by Peter Ling